

BLD-248

July 10, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 08-2282

THOMAS J. CAPANO

VS.

WARDEN PERRY PHELPS, ET AL.

(D. DEL. CIV. NO. 06-CV-00058)

Present: MCKEE, RENDELL and SMITH, Circuit Judges

Submitted are:

- (1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and
- (2) Appellant's motion for enlargement of page limitation in the above-captioned case.

Respectfully,

Clerk

MMW/KGL/crg

ORDER

Capano's motion to waive the page limitations for filing an application for a certificate of appealability is granted. His request for a certificate of appealability is denied. For the reasons stated by the District Court, Capano has not made a substantial showing of the denial of a constitutional right as a result of the Delaware state court's decision not to instruct the jury on lesser-included offenses to first degree murder. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). The decision that lesser-included offense instructions were not required because they lacked an evidentiary basis in the record was not contrary to, or an unreasonable application of, the Supreme Court's precedent in Beck v. Alabama, 447 U.S. 625 (1980), and its progeny.

By the Court,

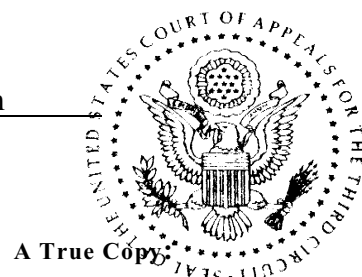
/s/ D. Brooks Smith

Circuit Judge

Dated: July 29, 2008

tyw/crg/cc: Joseph M. Bernstein, Esq.

Elizabeth R. McFarlan, Esq.



Marcia M. Waldron

Marcia M. Waldron, Clerk